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Convention on jurisdictional immunities of States and their property

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Report of the Chairman of the Working Group

Chairman: Mr. Gerhard **Hafner** (Austria)

I. Introduction

1. By paragraph 3 of its resolution 54/101 of 9 December 1999, the General Assembly decided that the open-ended working group of the Sixth Committee, established under resolution 53/98, would continue, at the fifty-fifth session of the General Assembly, its work on consideration of the future form of, and outstanding substantive issues related to, the draft articles on jurisdictional immunities of States and their property adopted by the International Law Commission at its forty-third session;[1]

2. At the fifty-fifth session of the General Assembly, the Sixth Committee, at its second meeting, on 25 September 2000, elected Mr. Gerhard Hafner (Austria) Chairman of the Working Group.

3. The Working Group held six meetings from 6 to 10 November 2000.

4. The Working Group had before it the draft articles on the topic, submitted by the Commission to the General Assembly in 1991; comments submitted by Governments, at the invitation of the General Assembly, on different occasions since 1991 (A/55/298, A/54/266, A/53/274 and Add.1, A/52/294, A/48/313, A/48/464, A/C.6/48/3 and A/47/326 and Add.1-5); document A/C.6/49/L.2, containing the conclusions of the chairman of the informal consultations held in 1994 in the Sixth Committee pursuant to Assembly decision 48/413; chapter VII of the report of the

[1] *Yearbook of the International Law Commission, 1991*, vol. II, Part Two (United Nations publication, Sales No. E.93.V.9 (Part 2)), document A/46/10, chap. II, para. 28.

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International Law Commission on the work of its fifty-first session[2] and the report of its Working Group on Jurisdictional Immunities of States and their property annexed thereto; the report of the Chairman of the Working Group of the Sixth Committee at the fifty-fourth session of the General Assembly (A/C.6/54/L.12); and three working papers submitted by the Chairman of the Working Group at the present session (A/C.6/55/WGJIS/WP.1; WP.2 and Add.1 and WP.3).

5. The Working Group held a general exchange of views. It was followed by a discussion of the five outstanding substantive issues identified at the previous session of the Working Group, namely: (a) concept of a State for purposes of immunity; (b) criteria for determining the commercial character of a contract or transaction; (c) concept of a State enterprise or other entity in relation to commercial transactions; (d) contracts of employment; and (e) measures of constraint against State property. Initially, the discussion had as a basis a working paper submitted by the Chairman of the Working Group at the present session (A/C.6/55/WGJIS/WP.1) and there were subsequently two revised versions of the paper (A/C.6/55/WGJIS/WP.2 and Add.1 and A/C.6/55/WGJIS/WP.3). The Working Group also had a discussion on possible future course of action in connection with the draft articles. As a result of the discussion held in the Working Group, the Chairman prepared a number of texts on the five outstanding issues, which could be seen as constituting a possible basis for further discussions on the topic.

II. General exchange of views

6. A number of delegations praised the work carried out by the International Law Commission on the topic as a solid draft with provisions constituting a very good, firm basis for further work. They stressed that the number of issues that still created some problems to delegations, although important, were really very few in number and that every effort should be made to solve them. They noted in this connection the progress already achieved in finding a solution at the preceding session of the Working Group. Some of the pending issues were very close to an agreed solution. In the view of these delegations a binding instrument in the form of a convention would constitute the most appropriate form to be given to the draft articles and a diplomatic conference would be the most appropriate forum for the adoption of such instrument. They recalled that the General Assembly had already called for such an instrument and a forum on the topic in several resolutions. A convention would have the advantage of stopping the proliferation of national laws on the topic, codifying existing practice of States in this area and promoting a uniform law on State immunity.

7. Some other delegations stressed that although the remaining substantive issues were few in number, they were nevertheless of a key nature for the draft articles as a whole. In their view, various efforts undertaken in different forums during the last decade tended to show that the difficulties in trying to solve them could well be of an insurmountable character. Such an exercise risked becoming repetitive without leading to concrete results. In their view, these difficulties reflected the current state of international law on the matter. State practice was far from being uniform on key issues, and in many States court decisions on State immunity were still evolving or developing. Consequently, these delegations viewed the possibility of convening a

[2] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10).

diplomatic conference for the purpose of adopting an international convention on the topic as an unrealistic approach. In their view, pragmatism and flexibility, both as to the substance and the format, were essential. The elaboration of a model law on the topic was mentioned by these delegations as a possible realistic outcome, one which would give guidance to States without necessarily freezing the solution to practical issues and State practice in this area. Other possible outcomes also mentioned by these delegations were the elaboration of general guidelines or principles on the topic in the form of a declaration by the General Assembly attached to a consensus resolution.

8. Some other delegations stressed that recent efforts in this area, and in particular the report of the Chairman of the Working Group at the preceding session of the Sixth Committee (A/C.6/54/L.12), showed that the Working Group had come very close to a generally agreed solution on some of the outstanding substantive issues. They mentioned, in particular, the issues concerning the concept of a State for purposes of immunity, the concept of a State enterprise or other entity in relation to commercial transactions and the contracts of employment.

9. Some delegations were in principle in favour of a convention on the topic as the most appropriate instrument to set out clear rules on jurisdictional immunity, limit the proliferation of national laws on the matter and avoid the insufficient legal weight and lack of true codification on the matter which the adoption of instruments of a different nature would entail. They were, however, ready to be flexible for the sake of achieving consensus or general agreement and could go along with the elaboration of other instruments, such as a model law on the topic, as an interim measure which would not preclude, later, the adoption of a convention.

10. As regards the methodology of the Working Group, some delegations indicated that, if general agreement still proved difficult to achieve on some of the outstanding substantive issues, the Working Group should at least try to further circumscribe the pending difficulties by producing two or three clear alternative texts for each issue.

III. The five outstanding substantive issues

11. The discussion on the five outstanding substantive issues revolved, initially, around an informal paper submitted by the Chairman (A/C.6/55/WGJIS/WP.1) containing a proposed text or various alternative proposed texts for each of the issues. In the light of the results on the discussion of that paper, the Chairman subsequently submitted two revised versions of his paper (A/C.6/55/WGJIS/WP.2 and Add.1 and WP.3), which were also discussed in the Working Group. The paragraphs below summarize the discussion held on the basis of those papers.

A. Concept of a State for purposes of immunity

12. The initial text submitted by the Chairman on this issue read as follows:

"Item 1
Definition of the State

Article 2, paragraph 1 (b)

'State' means:

(i) The State and its various organs of government;

(ii) Constituent units of a federal State and political subdivisions of the State, which are entitled to perform acts in the exercise of the governmental authority;

(iii) Agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform acts in the exercise of governmental authority of the State;

(iv) Representatives of the State acting in that capacity."

13. A number of comments or suggestions were made on the above formulation.

14. As regards subparagraph (ii), it was suggested that, on the first line, the conjunction "and" should be replaced by the conjunction "or".

15. Some delegations referred both to subparagraphs (ii) and (iii). It was suggested that both subparagraphs should be further circumscribed on the basis of subject matter. It was also suggested that the language in the subparagraphs could be standardized by using the qualifier "to the extent that" in both. Concerning the expression "entitled to" used in both subparagraphs, the suggestion was made that the source of the entitlement should be made clear. On the other hand, it was noted that the commentary to the article could be used for that purpose. It was suggested that the words "governmental authority" appearing in both subparagraphs should be replaced by the words "sovereign authority". On the other hand, it was also noted that the intention behind the words "governmental authority" had been to bring the draft article into line with the expression used in the International Law Commission draft on State responsibility.

16. As regards, in particular, subparagraph (iii), the suggestion was made to replace the conjunction "or" by the conjunction "and" before the words "other entities".

17. As a result of the discussion the Chairman presented a revised text on this issue which read as follows:

"Item 1
Definition of the State

Principle: For the purposes of jurisdictional immunities of States the expression 'State' includes also, beside the State and its various organs of government, constituent units of a federal government or political subdivisions of the State, which are entitled to perform acts in the exercise of the governmental authority, as well as agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform acts in the exercise of governmental authority of the State and representatives of the State acting in that capacity.

"Article 2
Use of terms

1. (a) ...

(b) 'State' means:

(i) The State and its various organs of government;

(ii) Constituent units of a federal State *or* political subdivisions of the State, which are entitled to perform acts in the exercise of the governmental authority;

(iii) Agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform acts in the exercise of governmental authority of the State;

(iv) Representatives of the State acting in that capacity."

18. Some delegations questioned the use of the word "principle" in the initial statement before the actual text of the provision. The Chairman explained that the purpose of the paragraph was only to clarify the basic concept involved in this outstanding issue. Similar paragraphs contained in revised versions of other texts contained in document A/C.6/55/WGJIS/WP.2 also served the same purpose.

19. As regards subparagraphs (ii) and (iii), it was suggested that the word "constitutionally" should be added before the word "entitled" to indicate the source of the entitlement. It was noted however that such an addition might not be acceptable to some federal States whose constituent units may not regard the constitution as the source of this entitlement. The suggestion was also made that the units, subdivisions and entities referred to in the subparagraphs should not only "be entitled to" but actually exercise governmental authority. It was proposed that the words: "provided that it was established that such authorities were acting in such capacity" should be added, mutatis mutandis, to both subparagraphs.

B. Criteria for determining the commercial character of a contract or transaction

20. The initial text submitted by the Chairman on this issue read as follows:

"Item 2
Definition of commercial character of a contract or transaction

Article 2, paragraph 1 (c)

'commercial transaction' means:

(i) Any commercial contract or transaction for the sale of goods or supply of services;

(ii) Any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction;

(iii) Any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

Paragraph 2

Delete the paragraph

OR:

2. In determining whether a contract or transaction is a "commercial transaction" under paragraph 1 (c), the circumstances being most relevant for the case shall be taken into account.

OR:

2. In determining whether a contract or transaction is a "commercial transaction" under paragraph 1 (c), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if, at the time of its conclusion, the State which is a party to it has expressly reserved that possibility and the other party has not expressly objected.

OR:

2. In determining whether a contract or transaction is a "commercial transaction" under paragraph 1 (c), reference should be made primarily to the nature of the contract and the purpose for which it is concluded, i.e. whether or not it relates to the carrying out of a public service mission."

21. Some delegations expressed a preference for alternative 1, which would delete paragraph 2 from the draft article and would eliminate any express indication of criteria in the determination of the commercial character of a contract or transaction. These delegations felt that this would be the most appropriate approach as it would leave the room open for the development of State practice and judicial interpretation. Other delegations found that such a deletion would not be very helpful and in practice would probably work in favour of the exclusive application of the nature test to the detriment of the purpose test. Such a deletion would also run counter to one of the goals of the draft articles as a whole, which was to provide guidance to Governments, courts and practitioners.

22. Alternative 2 did not gather much support. Some delegations felt that it was equivalent to a deletion of paragraph 2 since it contained no mention of specific criteria. Other delegations were of the view that the application of the phrase "circumstances being most relevant to the case" would create a great amount of uncertainty. Some other delegations sought to render option 2 more useful by means of additions. One suggestion was to insert after the word "circumstances" the following words: "including the nature of the contract or transaction and, if necessary, its purpose". Another suggestion was to add, after the word "circumstances" the words: "or elements, whether intrinsic or extrinsic".

23. Several delegations expressed support for alternative 3 either on its own merits or as a compromise solution if the alternative to delete paragraph 2 was not generally accepted. They were of the view that, if the purpose criterion were to be applied, both parties to the contract or transaction had to agree to it. It was also suggested that the word "primarily" before the word "nature" should be deleted. Several other delegations expressed objections to alternative 3. Some of those delegations could not accept what they perceived as a "veto power" granted to one of the parties to the contract or transaction in the application of the purpose test.

Other delegations found difficulties with the burden of proof concerning the expression of the will to apply the purpose test or to object to such an application. Some suggestions were made to modify alternative 3. One suggestion was to delete the limitations contained in the last part of the option and to add after the words: "but its purpose should also be taken into account" the words: "according to the circumstances". Another suggestion was to remove the word "primarily" before the word "nature" and to add, after the words "nature of the contract or transaction", the words "and if relevant in any particular case to its purpose". Some other delegations, which were in principle in favour of option 4, expressed a willingness, as a compromise, to work on an improved formulation of option 3.

24. Alternative 4 found favour with a number of delegations that saw it as an appropriate balance between the nature and the purpose tests in the determination of the commercial nature of a contract or transaction. Other delegations in favour of the nature test did not find alternative 4 acceptable and pointed, inter alia, to the difficulties in determining whether the purpose of a contract or transaction related to the carrying out of a public service mission. This test, if interpreted broadly, might apply to all contracts or transactions concluded by a State. A suggestion was made to add, at the end of alternative 4, the last phrase of alternative 3, namely the words: "if, at the time of its conclusion, the State which is a party to it has expressly reserved that possibility and the other party has not expressly objected."

25. As a result of the discussion, the Chairman submitted a revised text on this issue, which read as follows:

"Item 2
Definition of commercial character of a contract or transaction

Principle: The State cannot invoke jurisdictional immunities if it engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, in a proceeding arising out of that commercial transaction.

Alternative I

Article 2
Use of terms

1. (a) ...

(b) 'State' means: ...

(c) 'Commercial transaction' means:

(i) Any commercial contract or transaction for the sale of goods or supply of services;

(ii) Any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction;

(iii) Any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

2. Delete

Alternative II

Article 2
Use of terms

1. (a) ...

(b) 'State' means: ...

(c) 'Commercial transaction' means:

(i) Any commercial contract or transaction for the sale of goods or supply of services;

(ii) Any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction;

(iii) Any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

2. In determining whether a contract or transaction is a 'commercial transaction' under paragraph 1 (c), reference should be made to the nature of the contract *as well as to its purpose for which it is concluded, i.e. whether or not it relates to the carrying out of a public service mission, provided that the State which is a party to it has expressly reserved that possibility and the other party has not expressly objected.*"

26. Some delegations expressed a clear preference for alternative I for the reasons expressed in paragraph 21 above. Other delegations were opposed to such an alternative, also for the reasons pointed out in that paragraph.

27. A number of delegations supported alternative II, as drafted, and characterized it as an acceptable compromise between the nature test and the purpose test. Some other delegations, while favouring alternative II, suggested some amendments to it. One suggestion was to add, in paragraph 2, after the words "nature of the contract as well as", the following words: "if it is relevant under the national legislation of the State which is a party to it or the law applicable to the transaction" and to delete the final part of the paragraph starting with the words "provided that". In another suggestion, the preceding formulation should speak rather of "the law which the parties have agreed to apply to the transaction". In still another suggestion, it was proposed to add the words "all relevant evidence should be considered" after the words "under paragraph 1 (c)". Some other delegations were opposed to alternative II, although not necessarily for the same reasons. While, in one view, the alternative unacceptably placed on a par the nature test with the purpose test, in another view alternative II would jeopardize the applicability of the purpose test.

28. Some delegations expressed a preference for the original formulation of the draft article contained in the 1991 draft of the International Law Commission.

C. Concept of a State enterprise or other entity in relation to commercial transactions

29. The initial text submitted by the Chairman on this issue read as follows:

"Item 3
Concept of a State enterprise or other entity in relation to commercial transactions

Article 10

3. The immunity from jurisdiction enjoyed by a State shall not be affected with regard to a proceeding which relates to a commercial transaction engaged in by a State enterprise or other entity established by a State which has an independent legal capacity or is capable of:

(a) Suing or being sued;

(b) Acquiring, owning or possessing or disposing of property, including property which the State has authorized it to operate or manage.

OR:

3. Delete paragraph 3.

OR:

Article 10 a (new)
State enterprise

1. A State enterprise or other entity established by a State does not enjoy State immunity for commercial contracts engaged by it if and to the extent it has an independent legal capacity or is capable of:

(a) Suing or being sued;

(b) Acquiring, owning or possessing or disposing of property, including property which the State has authorized it to operate or manage.

2. Paragraph 1 applies also to a commercial transaction engaged in by a State enterprise or other entity established by a State,

(i) If this State enterprise or other entity acts as an authorized agent of the State; or

(ii) The State acts as guarantor of a liability to be assumed by this State enterprise or other entity.

3. The immunity from jurisdiction enjoyed by a State shall not be affected with regard to a proceeding which relates to a commercial transaction engaged in by a State enterprise or other entity established by a State to which paragraph 1 applies."

30. A number of comments and suggestions were made on the above three options.

31. As regards option 1 on this item, there were divergent views. A number of delegations supported the text proposed by the Chairman. Some of these delegations considered that the first part of the option should be replaced by the first part

(paragraph 1) of option 3 as the wording was clearer. Other delegations made some drafting suggestions. A view suggested to rephrase the text so as to ensure that it did not look as if it is the State which has the independent legal capacity. Another view suggested the simplification of this option including by the deletion of subparagraph (b).

32. A number of delegations were opposed to option 1, as it omitted the qualification that the immunity of the State enterprise applied only in circumstances where it acted as an authorized agent of the State or where the State acted as a guarantor of a liability assumed by the State enterprise.

33. As regards option 2, several delegations supported deleting paragraph 3 in its entirety as superfluous. Other delegations were in favour of retaining it.

34. As regards option 3, there were also divergent views. A number of delegations pointed out that it was unclear to them how it would operate in practice.

35. Other delegations were prepared to accept this option in principle provided that the issue of the under-capitalization of a State enterprise was addressed. The view was also made that paragraph 3 should be deleted, leaving only paragraphs 1 and 2 of option 3.

36. Several delegations that supported option 1 in principle were willing to work on the basis of option 3.

37. As a result of the discussion, the Chairman presented a revised text on this issue which read as follows:

"Item 3
Concept of a State enterprise or other entity in relation to commercial transactions

Principle: A State enterprise or other entity established by a State does not enjoy State immunity for commercial contracts engaged by it if and to the extent this enterprise or entity has an independent legal capacity and is capable of suing or being sued, and acquiring, owning or possessing or disposing of property, including property which the State has authorized it to operate or manage.

Alternative I

Article 10
Commercial transactions

3. The immunity from jurisdiction enjoyed by a State shall not be affected with regard to a proceeding which relates to a commercial transaction engaged in by a State enterprise or other entity established by a State which has an independent legal capacity *and* is capable of:

(a) Suing or being sued, *and*

(b) Acquiring, owning or possessing or disposing of property, including property which the State has authorized it to operate or manage.

Alternative II

Article 10
Commercial transactions

3. A State enterprise or other entity established by a State does not enjoy State immunity for commercial contracts engaged by it if and to the extent it has an independent legal capacity *and* is capable of:

(a) Suing or being sued, *and*

(b) Acquiring, owning or possessing or disposing of property, including property which the State has authorized it to operate or manage."

38. Several delegations noted their preference for either one or the other alternatives mentioned above and made a number of comments and suggestions on them. Some delegations indicated their flexibility to support either alternative.

39. Several delegations expressed their preference for alternative I. It was noted that this alternative corresponded to the original paragraph 3 of draft article 10 of the Commission's 1991 draft article and was clearer and reflected more accurately the existing practice. The view was also expressed that alternative I was more in keeping with the overall aim of the draft articles as a whole in that the emphasis was on the State's immunity not being affected in the event that a State enterprise or other entity is sued.

40. Other delegations reiterated their objection to a provision that did not expressly state that the State enterprise or other entity was acting as an agent of the State, or that the State was acting as a guarantor of a liability assumed by the State enterprise or other entity.

41. Alternative II was also supported by a number of delegations. Some delegations noted however that whilst this alternative was clearer, it presented the possibility of an *a contrario* interpretation being applied to it to the extent that if the State enterprise or other entity did not have independent legal capacity it would automatically enjoy State immunity in respect of commercial transactions. It was also suggested that the term "commercial transaction" be substituted for "commercial contract".

D. Contracts of employment

42. The initial text submitted by the Chairman on this issue read as follows:

"Item 4
Contracts of employment

Article 11

2. Paragraph 1 does not apply if:

(a) The employee has been recruited to perform functions in the exercise of governmental authority, in particular, diplomatic staff and consular officers, as defined in the Vienna Convention on Diplomatic Relations of 1961 as well as in the Vienna Convention on Consular Relations of 1963, diplomatic

staff of permanent missions to international organizations, members of special missions, persons recruited to represent a State in international conferences and other persons enjoying diplomatic immunity;

(c) *Delete the subparagraph.*"

43. A number of delegations supported the text as proposed by the Chairman. It was noted that the vagueness introduced by the phrase "closely related to" had been removed.

44. Other delegations suggested some drafting amendments. It was suggested to replace "in particular" with "such as" in order to emphasize the fact that this was a non-exhaustive list of categories of employees. It was also suggested to delete the reference to "diplomatic staff and consular officers" and to insert language along the lines of "persons falling within the scope of the respective Conventions".

45. Some delegations considered that the formulation of subparagraph (a) as proposed by the Chairman was too limited and that other categories of employees should be specified. These might include administrative and technical staff, press officers, protocol officers, as well as other employees recruited to perform functions relating to missions.

46. Other delegations expressed the view that it would not be appropriate to list all possible categories of employees. It was also suggested to shorten the list in the subparagraph and to make a reference to further categories of employees in a Commentary to the draft article.

47. As regards subparagraph (c) there was general agreement to follow the suggestion of the Chairman to delete the subparagraph.

48. It was also noted that as regards subparagraph (d) of draft article 11, an exception concerning nationals of the employer State having permanent residence in the forum State should be inserted.

49. As a result of the discussion, the Chairman presented a revised text on this issue which read as follows:

"Item 4
Contracts of employment

Principle: A State cannot invoke immunity from jurisdiction before a court of another State that is otherwise competent in a proceeding that relates to a contract of employment between the State and an individual unless:

–The employee has been recruited to perform functions in the exercise of governmental authority;

–The subject of the proceeding is the recruitment, renewal of employment or reinstatement of an individual;

–The employee is a national of the employer State at the time when the proceeding is instituted, and this person has permanent residence outside the forum State; or

–The employer State and the employee have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the

State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding.

Article 11
Contracts of employment

2. Paragraph 1 does not apply if:

(a) The employee has been recruited to perform functions in the exercise of governmental authority, *such as* diplomatic staff and consular officers, as defined in the Vienna Convention on Diplomatic Relations of 1961 as well as in the Vienna Convention on Consular Relations of 1963, diplomatic staff of permanent missions to international organizations, members of special missions, persons recruited to represent a State in international conferences and other persons enjoying diplomatic immunity;

(c) Delete

(d) The employee is a national of the employer State at the time when the proceeding is instituted, *unless this person has the permanent residence in the forum State*; or ..."

50. Several delegations expressed their support for the revised text. These delegations noted that the proposed text struck the appropriate balance and better reflected the intention behind the original provision as proposed by the Commission.

51. Other delegations were of the opinion that the list of categories in subparagraph (a) should be expanded to provide for a wider category of persons, in particular for technical and administrative personnel. A view was that the qualifier "such as" was too specific and would be incompatible with the national legislation of some delegations. It was suggested to replace "such as" with "including" and to delete "other persons enjoying diplomatic immunity". The suggestion was also made to insert the word "particular" before "functions" and to replace "diplomatic staff and consular officers" with "members of a diplomatic and consular mission", thereby broadening the categories of employees covered by subparagraph (a).

52. A view was expressed that the phrase "closely related to" as originally suggested by the Commission was preferable to the phrase "in the exercise of governmental authority". Another view considered that the expression "closely related to" unduly extended the scope of the provision. A suggestion was made to add the phrase "or closely related to such exercise" after "governmental authority" in order to distinguish between the direct exercise of functions and those functions that are closely related to such exercise of functions. One view expressed concern over this latter proposal. It was also proposed to substitute "State authority" for "governmental authority" although this also met with some objection.

E. Measures of constraint against State property

53. The initial text submitted by the Chairman on this issue read as follows:

"Item 5
Measures of constraint

Article 18
State immunity from measures of constraint

1. No pre-judgement measures of constraint against property of a State may be taken in connection with a proceeding before a court of another State unless and to the extent that:

(a) The State has expressly consented to the taking of such measures as indicated:

(i) By international agreement;

(ii) By an arbitration agreement or in a written contract;

(iii) In any other manner by a validly given declaration;

(b) The State has allocated or earmarked property for the satisfaction of the claim that is the object of that proceeding.

2. No post-judgement measures of constraint, such as attachment, arrest and execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and to the extent that:

(a) The State has expressly consented to the taking of such measures as indicated:

(i) By international agreement;

(ii) By an arbitration agreement or in a written contract;

(iii) In any other manner by a validly given declaration; or

(b) The State has allocated or earmarked property for the satisfaction of the claim that is the object of that proceeding.

This paragraph is without prejudice to any other legal grounds for taking such measures against the property of a State in connection with a proceeding before a court of another State.

OR:

1. No measures of constraint, such as attachment, arrest and execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and to the extent that:

(a) The State has expressly consented to the taking of such measures as indicated:

(i) By international agreement;

(ii) By an arbitration agreement or in a written contract;

(iii) In any other manner by a validly given declaration; or

(b) The State has allocated or earmarked property for the satisfaction of the claim that is the object of that proceeding.

2. The preceding paragraph is without prejudice to any other legal grounds for taking such measures against the property of a State in connection with a proceeding before a court of another State.

OR:

A State is obliged to give effect to a final judgement given against it by a court of another State if the former cannot claim immunity in the proceedings, unless this obligation would contradict the *ordre public* of that State."

54. A number of comments and suggestions were made on the above three options.

55. As regards option 1, there were divergent views. Some delegations generally supported the distinction between pre-judgement and post-judgement measures of constraint. A view was expressed however that in practice the distinction may not make much difference. It was suggested that the same sentence found at the end of paragraph 2 of option 1, to the effect that the paragraph is "without prejudice to any other legal grounds for taking such measures against the property of a State in connection with a proceeding before a court of another State", should be also inserted at the end of paragraph 1.

56. Other delegations were completely opposed to a distinction between pre-judgement and post-judgement measures of constraint.

57. As regards option 2, several delegations expressed their preference for this option subject to certain clarifications. Some drafting amendments were suggested. A proposal was made to insert wording to the effect that the option would apply to both pre-judgement and post-judgement measures of constraint. The suggestion was also made to insert into option 2 subparagraph 1 (c) of draft article 18 of the Commission's 1991 draft articles. A view also suggested that the word "treaty" be substituted for the word "agreement" in subparagraph (a) (i) and that subparagraph (a) (iii) be reformulated to read: "by a validly given unilateral declaration".

58. Some delegations expressed their concern over the breadth and clarity of the expression "other legal grounds" contained in paragraph 2. The suggestion was made to qualify these words with the word "international". A view suggested the deletion of paragraph 2 in this option but that it may still apply to the situation of pre-judgement measures of constraint in option 1.

59. As regards option 3, a number of delegations were not in favour of this option as they considered the concept of *ordre public* to be too ambiguous. On the other hand, the view was also expressed that the concept was well known in law and that its application should pose no problem.

60. The view was expressed that all three options were too restrictive. This view considered that, in accordance with its own national legislation, States should be treated in the same way as a private party.

61. A number of other options were also suggested. One was the inclusion of the original draft article 18 of the Commission's 1991 draft articles as an option. Another was the creation of a new option that combines paragraph 1 of option 1, the last sentence of paragraph 2 of option 1 and option 3. A number of delegations supported the second proposal.

62. It was also noted that whatever changes are made to article 18 would require a consequential adjustment to other relevant articles, in particular to draft article 19.

63. As a result of the discussion, the Chairman presented a revised text on this issue which read as follows:

"Item 5
Measures of constraint against State property

Principle: Unless the State has expressly consented either ad hoc or in advance, or the measures of constraint, such as attachment, arrest and execution, taken by a court of another State against the property of the former involve property designated to satisfy the claim, no such act may be taken in connection with a proceeding before a court of another State except in certain well-defined circumstances according to applicable rules of international law, and against property which is not used for governmental purposes. Nevertheless, the State remains bound to satisfy the final judgement to the extent that it does not contradict its *ordre public*.

Alternative I

Article 18
State immunity from measures of constraint

1. No pre-judgement measures of constraint against property of a State may be taken in connection with a proceeding before a court of another State unless and to the extent that:

(a) The State has expressly consented to the taking of such measures as indicated:

(i) By international agreement;

(ii) By an arbitration agreement or in a written contract; *or*

(iii) In any other manner by a validly given declaration; *or*

(b) The State has allocated or earmarked property for the satisfaction of the claim that is the object of that proceeding.

2. No post-judgement measures of constraint, such as attachment, arrest and execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and to the extent that:

(a) The State has expressly consented to the taking of such measures as indicated:

(i) By international agreement;

(ii) By an arbitration agreement or in a written contract; *or*

(iii) In any other manner by a validly given declaration; *or*

(b) The State has allocated or earmarked property for the satisfaction of the claim that is the object of that proceeding.

This paragraph is without prejudice to any other legal grounds *based on applicable rules of international law* for taking such measures against the property of a State in connection with a proceeding before a court of another State.

Alternative II

Article 18
State immunity from measures of constraint

1. *No pre-judgement measures of constraint against property of a State may be taken in connection with a proceeding before a court of another State unless and to the extent that*:

(a) *The State has expressly consented to the taking of such measures as indicated*:

(i) *By international agreement;*

(ii) *By an arbitration agreement or in a written contract; or*

(iii) *In any other manner by a validly given declaration; or*

(b) *The State has allocated or earmarked property for the satisfaction of the claim that is the object of that proceeding.*

This paragraph is without prejudice to any other legal grounds based on applicable rules of international law for taking such measures against the property of a State in connection with a proceeding before a court of another State.

2. *A State is obliged to give effect to a final judgement given against it by a court of another State if the former cannot claim immunity in the proceedings, unless this obligation would contradict the* ordre public *of that State.*

Alternative III

Article 18
State immunity from measures of constraint

1. No measures of constraint, such as attachment, arrest and execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and to the extent that:

(a) The State has expressly consented to the taking of such measures as indicated:

(i) By international agreement;

(ii) By an arbitration agreement or in a written contract; or

(iii) In any other manner by a validly given declaration; or

(b) The State has allocated or earmarked property for the satisfaction of the claim that is the object of that proceeding.

2. The preceding paragraph is without prejudice to any other legal grounds based on applicable rules of international law for taking such measures against the property of a State in connection with a proceeding before a court of another State.

Alternative IV

Article 18
State immunity from measures of constraint

A State is obliged to give effect to a final judgement given against it by a court of another State if the former cannot claim immunity in the proceedings, unless this obligation would contradict the *ordre public* of that State.

[Article 19
Specific categories of property

1. *Unless it appears from the circumstances that the State has consented to it, the following categories, in particular, of property of a State shall not be considered as property against which measures of constraint, such as attachment, arrest and execution, against property of a State may be taken in connection with a proceeding before a court of another State*:

(a) *Property, including any bank account, that is used or intended for the purposes of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences*;

(b) *Property of a military character or used or intended for use for military purposes*;

(c) *Property of the central bank or other monetary authority of the State*;

(d) *Property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale*;

(e) *Property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale*.

2. *Delete]*"

64. Delegations continued to express widespread divergent views on this item. Several delegations noted their preference for either one or more of the various alternatives proposed in the revised text of the Chairman. Some delegations were prepared to maintain flexibility towards the various alternatives while other delegations noted their strong preference for either one or several alternatives.

65. A number of delegations reiterated their preference for the original text of draft article 18 as proposed by the Commission in its 1991 draft articles on the topic.

66. As regards the notion of *ordre public* found in the *Principle* and alternatives II and IV, several delegations reiterated their concern regarding the ambiguity of this concept. A view suggested to qualify these words by the word "international". Another view considered however that the notion of *ordre public* was to be interpreted in a flexible manner and was common to many national jurisdictions.

67. As regards alternative I, several delegations continued to express a preference for a distinction between pre-judgement and post-judgement measures of constraint. It was noted that the first sentence of alternative I would be better reformulated in a

positive way by deleting the word "No" at the beginning of the sentence and by substituting the words "unless and to the extent that" by "if".

68. A number of delegations supported the notion of consent in respect of pre-judgement measures of constraint. As regards post-judgement measures of constraint, it was proposed to insert a grace period of two to three months for the voluntary execution of the judgement.

69. The view was expressed that while alternative I was generally clearer as compared to the other alternatives there remained ambiguity in the last part of paragraph 2 relating to "other legal grounds based on applicable rules of international law". It was suggested that examples might be given of these applicable rules of international law.

70. As regards alternative III, some delegations expressed their preference for this alternative. It was noted that this alternative was broad and flexible and did not complicate the issues by making a distinction between pre- and post-judgement measures of constraint.

71. A view which supported this alternative reiterated the suggestion to change the word "agreement" in subparagraph (a) (ii) to "treaty" and to reformulate subparagraph (iii) as follows: "by a validly given unilateral declaration". This view also suggested that the phrase "based on applicable rules of international law" should be replaced by the words "based on applicable treaty rules". It was also suggested to retain article 18 (c) and article 19 of the 1991 draft articles.

72. As a result of the discussion, the Chairman presented a further revised text on this issue which read as follows:

"Item 5
Measures of constraint against State property

Principle: Unless the State has expressly consented either ad hoc or in advance, or the measures of constraint, such as attachment, arrest and execution, taken by a court of another State against the property of the former involve property designated to satisfy the claim, no such act may be taken in connection with a proceeding before a court of another State except in certain well-defined circumstances according to applicable rules of international law, and against property which is not used for governmental purposes.

Alternative I

Article 18
State immunity from measures of constraint

1. No measures of constraint, such as attachment, arrest and execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(a) the State has expressly consented to the taking of such measures as indicated:

(i) By international agreement;

(ii) By an arbitration agreement or in a written contract; or

(iii) By a declaration before the court or by a written communication after a dispute between the parties has arisen; or

(b) The State has allocated or earmarked property for the satisfaction of the claim that is the object of that proceeding; or

(c) The property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum and has a connection with the claim that is the object of the proceeding or with the agency or instrumentality against which the proceeding was directed.

2. Consent to the exercise of jurisdiction under article 7 shall not imply consent to the taking of measures of constraint under paragraph 1, for which separate consent shall be necessary.

Alternative II

Article 18
State immunity from measures of constraint

1. No measures of constraint, such as attachment, arrest and execution, against property of a Stare may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(a) The State has expressly consented to the taking of such measures as indicated:

(i) By international agreement;

(ii) By an arbitration agreement or in a written contract; or

(iii) By a declaration before the court or by a written communication after a dispute between the parties has arisen; or

(b) The State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or

(c) The property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum.

2. Consent to the exercise of jurisdiction under article 7 shall not imply consent to the taking of measures of constraint under paragraph 1, for which separate consent shall be necessary.

Alternative III

Article 18
State immunity from measures of constraint

1. No measures of constraint, irrespective of whether pre-judgement or post-judgement measures, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(a) The State has expressly consented to the taking of such measures as indicated:

(i) By international agreement;

(ii) By an arbitration agreement or in a written contract; or

(iii) In any other manner by a validly given declaration; or

(b) The State has allocated or earmarked property for the satisfaction of the claim that is the object of that proceeding.

2. In other cases than those mentioned above, where such post-judgement measures are taken, the State against which a final judgement was rendered shall be granted a three months grace period to comply with the judgement unless the applicable rules of international law provide otherwise.

3. Consent to the exercise of jurisdiction under article 7 shall not imply consent to the taking of measures of constraint under paragraph 1, for which separate consent shall be necessary.

Alternative IV

Article 18
State immunity from measures of constraint

1. No measures of constraint, such as attachment, arrest and execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(a) The State has expressly consented to the taking of such measures as indicated:

(i) By international agreement;

(ii) By an arbitration agreement or in a written contract; or

(iii) In any other manner by a validly given declaration; or

(b) The State has allocated or earmarked property for the satisfaction of the claim that is the object of that proceeding.

2. In other cases than those mentioned above, where such measures are taken, the State against which a final judgement was rendered shall be granted a three months grace period to comply with the judgement unless the applicable rules of international law provide otherwise.

3. Consent to the exercise of jurisdiction under article 7 shall not imply consent to the taking of measures of constraint under paragraph 1, for which separate consent shall be necessary."

73. Delegations made various comments and suggestions on the Chairman's second revised text on this item. A number of delegations stated a clear preference for one alternative, subject to certain amendments. Other delegations were prepared to be flexible towards several alternatives.

74. Some delegations supported alternative I as the basis for further discussion. The suggestion was made to include the words "whether pre-judgement or post-judgement measures of constraint".

75. Other delegations noted their preference to work on the basis of alternative II but indicated a measure of flexibility toward working on alternative I as a basis for further discussion.

76. Several delegations expressed a preference towards alternative II. It was noted that the text was concise, simpler and more direct. However, it was considered that the text would be improved if this alternative distinguished between pre-judgement and post-judgement measures of constraint.

77. As regards subparagraph (a) (iii) of alternatives I and II, the view was expressed that the reference to written communication was unclear and that it might be necessary to specify to whom the communication is made. A view also suggested the addition of the word "valid" before "declaration".

78. As regards subparagraph (c) of alternatives I and II, the suggestion was made to introduce an objective element into the text that would take away the need to establish the intention of the State to the use of the property by adding at the beginning of the sentence "It is established that" or by deleting the reference to "intention". Several delegations supported this suggestion. The view was also expressed that a linkage should be made between the property of the State and the claim.

79. Some delegations considered that the formulation in subparagraph (c) of alternative II might be too broad. The view was expressed that subparagraph (b) might achieve the same objective. A number of delegations noted their preference for the inclusion of the formulation found in subparagraph (c) of alternative I into alternative II. The view was also expressed in support of the existing formulation in subparagraph (c) of alternative II.

80. Another view considered it necessary to ensure consistency between the consent requirement in paragraph 2 and subparagraph (c) and suggested to add the phrase "and the State has expressly consented to the taking of measures of constraint" at the end of subparagraph (c).

81. It was also suggested to reformulate subparagraph (c) as a separate distinct paragraph of article 18.

82. Some delegations expressed a preference to use alternative III as a basis for further discussions. In this regard, it was considered that subparagraph (c) of alternative II should be added to this alternative. The view was expressed that the reference to a grace period in paragraph 2 of alternative III would introduce an element of uncertainty as to the status of property during the period.

83. As regards alternative IV, no substantive comments or suggestions were made, nor was any support expressed for this alternative.

IV. Future course of action to be taken with regard to the topic

84. A number of delegations expressed the view that, whatever the final form of the future instrument on the topic, after consideration of the International Law

Commission draft articles for almost 10 years in working groups or informal consultations of the Sixth Committee, the time had come for convening a more formal body. This body, which could be an ad hoc committee or a preparatory commission, should have as its main mandate either the preparation of a basic document for a diplomatic conference to draft an international convention on the topic or of a legal document consisting of a model law of legal principles which could serve as guideline to governments, courts and practitioners.

85. A number of other delegations were of the view that the idea of convening a body along the lines described in the preceding paragraphs was premature. In their view, substantive differences still remained on basic and key issues of the draft. Without prior agreement on those issues such a body or a diplomatic conference were bound to fail. And an agreement on such issues was almost impossible to obtain because the law and state practice were still shifting on those issues.

86. On the question whether the final instrument should be a binding instrument or some form of soft law document such as a model law or guidelines, similar conflicting views to those already reflected in paragraphs 6 to 9 of the general exchange of views above were expressed.

87. Some delegations, that supported the establishment of a more formal body to deal with the topic in the future noted that, in spite of the difficulties involved in the outstanding issues, it was clear that some measure of progress had been achieved both at the previous and present sessions of the Working Group. Although some controversial points still remained to be solved, they were really very few in comparison with the numerous political and technical difficulties that past diplomatic conferences on legal matters, including the Rome Conference on the International Criminal Court, had had to negotiate and solve in the space of a few weeks. The purpose of political bodies such as ad hoc committees, preparatory commissions and diplomatic conferences was precisely the negotiation of the most difficult problems pending in the drafting of a legal instrument.

V. Suggestions by the Chairman for further work on the topic

88. In the light of the discussions held within the Working Group of the Sixth Committee at the fifty-fifth session of the General Assembly, the following texts could be seen as constituting a possible basis for further discussions:

Item 1
Definition of the State

Basic concept of this item: For the purposes of jurisdictional immunities of States the expression "State" includes also, beside the State and its various organs of government, constituent units of a federal State or political subdivisions of the State, which are entitled to perform acts in the exercise of the sovereign authority, as well as agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform acts in the exercise of sovereign authority of the State and representatives of the State acting in that capacity.

Article 2
Use of terms

1. (a) ...

(b) "State" means:

(i) The State and its various organs of government;

(ii) Constituent units of a federal State or political subdivisions of the State, which are entitled to perform acts in the exercise of the sovereign authority, provided that it was established that such entities were acting in that capacity;

(iii) Agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State;

(iv) Representatives of the State acting in that capacity.

Item 2
Definition of commercial character of a contract or transaction

Basic concept of this item: The State cannot invoke jurisdictional immunities if it engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, in a proceeding arising out of that commercial transaction.

Alternative I

Article 2
Use of terms

1. (a) ...

(b) "State" means: ...

(c) "Commercial transaction" means:

(i) Any commercial contract or transaction for the sale of goods or supply of services;

(ii) Any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction;

(iii) Any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

2. Delete

Alternative II

Article 2
Use of terms

1. (a) ...

(b) "State" means: ...

(c) "Commercial transaction" means:

(i) Any commercial contract or transaction for the sale of goods or supply of services;

(ii) Any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction;

(iii) Any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

2. In determining whether a contract or transaction is a "commercial transaction" under paragraph 1 (c), reference should be made to the nature of the contract as well as to its purpose for which it is concluded, i.e. whether or not it relates to the carrying out of a public service mission, provided that the State which is a party to it has expressly reserved that possibility and the other party has not expressly objected.

Alternative III

Article 2
Use of terms

1. (a) ...

(b) "State" means: ...

(c) "Commercial transaction" means:

(i) Any commercial contract or transaction for the sale of goods or supply of services;

(ii) Any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction;

(iii) Any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

2. In determining whether a contract or transaction is a "commercial transaction" under paragraph 1 (c), reference should be made to the nature of the transaction as well as, in accordance with the national legislation of the State which is a party to the contract or transaction, to its purpose for which it is concluded, i.e. whether or not it relates to the carrying out of a public

service mission, provided that it has not been agreed upon otherwise by the parties to the contract or transaction.

Item 3
Concept of a State enterprise or other entity in relation to commercial transactions

Basic concept of this item: A State enterprise or other entity established by a State does not enjoy State immunity to the extent this enterprise or entity has an independent legal capacity and is capable of suing or being sued, and acquiring, owning or possessing or disposing of property, including property which the State has authorized it to operate or manage.

Alternative I

Article 10
Commercial transactions

3. The immunity from jurisdiction enjoyed by a State shall not be affected with regard to a proceeding which relates to a commercial transaction engaged in by a State enterprise or other entity established by a State which has an independent legal capacity and is capable of:

(a) Suing or being sued, and

(b) Acquiring, owning or possessing or disposing of property, including property which the State has authorized it to operate or manage.

Alternative II

Article 10
Commercial transactions

3. Without prejudice to the other provisions, a State enterprise or other entity established by a State does not enjoy State immunity to the extent it has an independent legal capacity and is capable of:

(a) Suing or being sued, and

(b) Acquiring, owning or possessing or disposing of property, including property which the State has authorized it to operate or manage.

Item 4
Contracts of employment

Basic concept of this item: A State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual unless

–The employee has been recruited to perform functions in the exercise of governmental authority, including persons enjoying diplomatic immunities;

–The subject of the proceeding is the recruitment, renewal of employment or reinstatement of an individual;

–The employee is a national of the employer State at the time when the proceeding is instituted, and this person has the permanent residence outside the forum State; or

–The employer State and the employee have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject matter of the proceeding.

Article 11
Contracts of employment

2. Paragraph 1 does not apply if:

(a) The employee has been recruited to perform particular functions in the exercise of governmental authority;

(a bis) Members of the diplomatic staff and consular officers, as defined in the Vienna Convention on Diplomatic Relations of 1961 as well as in the Vienna Convention on Consular Relations of 1963, diplomatic staff of permanent missions to international organizations, members of special missions, persons recruited to represent a State at international conferences and other persons enjoying diplomatic immunity;

(c) Delete

(d) The employee is a national of the employer State at the time when the proceeding is instituted, unless this person has the permanent residence in the forum State; or ...

Item 5
Measures of constraint against State property

Basic concept of this item: Unless:

–The State has expressly consented either ad hoc or in advance to measures of constraint, such as attachment, arrest and execution, taken by a court of another State against the property of the former, or

–The measures of constraint, such as attachment, arrest and execution, taken by a court of another State against the property of the former involve property designated to satisfy the claim,

no such act may be taken in connection with a proceeding before a court of another State except in certain well defined circumstances according to applicable rules of international law, and against property that is not used for governmental purposes.

New article XY (preceding article 18)
Pre-judgement measures of constraint

No pre-judgement measures of constraint, such as attachment, arrest and execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(a) The State has expressly consented to the taking of such measures as indicated:

(i) By international agreement;

(ii) By an arbitration agreement or in a written contract; or

(iii) By a declaration before the court or by a written communication after a dispute between the parties has arisen; or

(b) The State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding.

New article 18 bis (following article 18)

Where consent to the measures of constraint is required under article XY and article 18, consent to the exercise of jurisdiction under article 7 shall not imply consent to the taking of measures of constraint.

Alternative I

Article 18
State immunity from post-judgement measures of constraint

1. No post-judgement measures of constraint, such as attachment, arrest and execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(a) The State has expressly consented to the taking of such measures as indicated:

(i) By international agreement;

(ii) By an arbitration agreement or in a written contract; or

(iii) By a declaration before the court or by a written communication after a dispute between the parties has arisen; or

(b) The State has allocated or earmarked property for the satisfaction of the claim that is the object of that proceeding; or

(c) It has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum [and has a connection with the claim that is the object of the proceeding or with the agency or instrumentality against which the proceeding was directed].

Alternative II

Article 18
State immunity from measures of constraint

1. No post-judgement measures of constraint, such as attachment, arrest and execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(a) The State has expressly consented to the taking of such measures as indicated:

(i) By international agreement;

(ii) By an arbitration agreement or in a written contract; or

(iii) By a declaration before the court or by a written communication after a dispute between the parties has arisen; or

(b) The State has allocated or earmarked property for the satisfaction of the claim that is the object of that proceeding.

2. In cases other than those mentioned above, no measures of constraint shall be taken against the property of a State against which a final judgement was rendered by a court of another State before the former State is granted a three months grace period to comply with this judgement unless the applicable rules of international law provide otherwise. If the State has not complied with the judgement within this period, measures of constraint may be taken against the property of this State, where it has been established that it is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum.